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No. 90-760

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK CARDEN MCNUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was subject to prosecution for conspiring to violate 18 U.S.C. 2512(1)(b), which prohibits the manufacture, assembly, possession, or sale of any device primarily useful for the surreptitious interception of electronic communications, by virtue of his participation in a scheme to distribute, to persons who had not paid subscriber fees for pay television channels, devices capable of descrambling the satellite transmissions for those channels.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 908 F.2d 561.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1990. A petition for rehearing was denied on August 17, 1990. The petition for a writ of certiorari was filed on November 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of conspiring to vio-

late 18 U.S.C. 1029 and 18 U.S.C. 2512. On appeal, the court of appeals upheld petitioner's conviction but remanded for resentencing. Pet. App. 1a-9a. On remand, petitioner was sentenced to 3½ years' probation and was ordered to pay a $5000 fine and $5000 in restitution.

1. Providers of pay television transmit their programming to communications satellites, which in turn relay it to satellite dishes on the ground. In the 1980s, many individuals purchased satellite dishes capable of receiving satellite television signals, thereby obtaining pay television without paying for the service. In response, providers of pay television began to scramble their broadcasts, making them unintelligible to unauthorized viewers. Persons authorized to receive the signals use descrambler modules to obtain intelligible programming. Each descrambler module has its own "address." In return for fees from a subscriber, a pay television provider adds a signal to its satellite transmissions that activates the module with that subscriber's address, causing the module to descramble the transmissions. Pet. App. 2a-3a.

Count 1 of the indictment alleged that petitioner and others conspired to violate 18 U.S.C. 1029 and 18 U.S.C. 2512(1)(b) by modifying descrambler modules to enable unauthorized viewers to descramble satellite television transmissions. The government's evidence showed that petitioner and co-conspirator James J. Baker owned a satellite equipment store out of which they sold and serviced equipment. Co-conspirator Hank Dwayne Wilson, an employee in the store, modified the descrambler modules so that they were capable of descrambling pay television channels.[1]

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[1] The co-conspirators obtained chips containing addresses authorized to receive all of the more than 50 pay television

Both new descramblers and equipment brought by customers to petitioner's store for servicing were modified; as a result, hundreds of customers were able to view scrambled television programming without paying for it.[2]

2. Before trial, petitioner moved to dismiss the conspiracy count on the ground that neither Section 1029 nor Section 2512(1)(b) applied to descrambler modules. The district court denied the motion. In a special verdict form, the jury found that petitioner was guilty of a conspiracy to violate both statutes.

On appeal, the court of appeals sustained petitioner's contention that Section 1029 was inapplicable to his conduct. The court held, however, that petitioner was subject to prosecution for conspiring to violate Section 2512(1)(b). That statute penalizes

> any person who intentionally * * * manufactures, assembles, possesses or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device

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channels. They then programmed other chips so that they contained those addresses. When placed in descrambler modules, the programmed chips would respond as though they had addresses authorized to receive the pay television channels; signals programmed to activate a single module with an authorized address would activate the many modules distributed through the efforts of the co-conspirators.

[2] There is no transcript of the trial, and neither party's appellate brief included a summary of the evidence. Our recitation of the government's case is based upon information provided by the Assistant United States Attorney who prosecuted the case. The sufficiency of the evidence is not contested.

> or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce.

The court concluded that television signals are "electronic communications" within the meaning of the statutory definition, 18 U.S.C. 2510(12); that satellite television descramblers are "electronic devices which effectuate the interception of electronic communications"; and that the interception of scrambled signals is "surreptitious" when undertaken without the knowledge or authorization of the signals' providers. Pet. App. 7a-8a.

Because the jury's special verdict indicated that petitioner had been found guilty of conspiring to violate both Section 2512(1)(b) and Section 1029, the court upheld petitioner's conviction to the extent that it rested on a conspiracy to violate the former Section. Pet. App. 9a. The court remanded for resentencing in light of the possibility that the sentence could have been affected by the jury's determination that petitioner had also conspired to violate Section 1029. On remand, the district court sentenced petitioner to 3½ years' probation and ordered him to pay a $5000 fine and $5000 in restitution.

ARGUMENT

Petitioner contends (Pet. 5-10) that 18 U.S.C. 2512 (1)(b) does not apply to the manufacture, sale, assembly, or possession of devices whose function is to descramble encrypted television signals. Because the decision below is correct and does not conflict with any decision of this Court or any other court of appeals, review by this Court is unwarranted.

The court of appeals correctly rejected petitioner's interpretation of Section 2512(1)(b). By its terms, that Section applies to "any person who intentionally * * * manufactures, assembles, possesses, or sells any electronic * * * device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of * * * electronic communications, and that such device * * * has been or will be sent through the mail or transported in interstate or foreign commerce." The plain language of the statute reaches descrambler modules of the sort distributed by the conspirators in this case. Each such module was an "electronic device" that was modified for the sole purpose of facilitating the "surreptitious interception" of satellite television signals intended for holders of authorized descrambler units. The scrambled transmissions were "electronic communications" as defined by 18 U.S.C. 2510(12); that term includes "any transfer of * * * images [or] sounds * * * of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce," with exceptions not applicable here.

There is no merit to petitioner's contention (Pet. 9-10) that the modules distributed by the conspirators were not "electronic devices which effectuate

the interception of electronic communications," since they themselves did not receive the satellite signal. The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. 2510(4). Plainly, the modified descramblers distributed by the conspiracy were designed to "acqui[re] * * * the contents" of television programs that would otherwise have been unintelligible to owners of satellite dishes alone. By its terms, therefore, the statute encompasses devices of the type distributed by the conspirators in this case.

Contrary to petitioner's contention, Section 2512 (1)(b) does not contain an implicit exception for devices whose function is to permit the surreptitious interception of scrambled satellite television transmisions. Section 2511, which prohibits the interception of wire, oral, or electronic communications, contains an exemption for otherwise illegal conduct "that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—(i) to a broadcasting station for purposes of retransmission to the general public; or (ii) as an audio subcarrier intended for redistribution to facilities open to the public." 18 U.S.C. 2511(4)(c).[3] This exemption makes clear

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[3] The term "audio subcarriers" refers to "broadcast stations, cable TV systems and like facilities." S. Rep. No. 541, 99th Cong., 2d Sess. 22 (1986) [hereinafter *Senate Report*]. See also 18 U.S.C. 2511(4)(b) (providing a $500 fine for first offenders in cases in which the offense does not involve a tortious or illegal purpose or commercial advantage and the wire or electronic communication is a radio communication that is not scrambled or encrypted); 18 U.S.C. 2511(5) (providing for civil suits and civil fines for cases involving interception of private video communication that is not

Congress's understanding that Section 2511 applies to the unauthorized interception of satellite television signals. See *Senate Report* at 6-7. If the statute did not apply to that conduct, as petitioner suggests, there would have been no need for the exemption. Furthermore, the exemption permits the interception of satellite television transmissions only when the transmissions are not encrypted or scrambled. By necessary implication, the interception of scrambled transmissions remains prohibited. Since Section 2511 prohibits interceptions of scrambled television signals, there is no reason to suppose that Section 2512 contains an exemption—nowhere suggested in the text of that Section—for devices facilitating those interceptions.

Nothing in the legislative history on which petitioner relies justifies a departure from the plain language of the statute. Although the Senate Report included a glossary describing "some of the new telecommunications and computer technologies referred to" in the 1986 amendments to the statute (*Senate Report* at 8-9), the glossary was plainly not intended as an all-inclusive list of the technologies protected by the statute. Compare Pet. 8. As shown, the definitions that determine the statute's scope encompass satellite television transmissions, and provisions specifically addressing the interception of those transmissions confirm the statute's reach.

The Report's reference to the Communications Act of 1934, on which petitioner places heavy reliance (Pet. 9), was part of an explanation of the exemption that was ultimately enacted in Section 2511 (4)(c). As the material preceding the excerpt quoted

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scrambled or encrypted); 18 U.S.C. 2520(c) (fixing damages for conduct encompassed by 18 U.S.C. 2511(5)).

by petitioner makes clear, the "private viewing" referred to was limited to private viewing of transmissions within the exemption—*i.e.*, transmissions that were not encrypted or scrambled. See *Senate Report* at 21-22.[4] Read in context, the excerpt on which petitioner relies suggests no exemption for the interception of scrambled transmissions.

As the Report noted, private viewing of transmissions that are not encrypted is governed only by Section 705 of the Communications Act of 1934, 47 U.S.C. 605. Unlike 18 U.S.C. 2511, Section 705 prohibits some interceptions of satellite television transmissions that are not encrypted. Section 705(a) is a general prohibition on the interception of wire or radio communications; from that prohibition, Section 705(b) exempts "the interception or receipt * * * of any satellite cable programming for private viewing" if (1) the programming involved is not encrypted *and* (2) either no marketing system has been established under which the individual can be authorized to receive the programming or the individual has obtained authorization for private viewing under such a system.[5] Thus, Section 705 prohibits

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[4] A prior paragraph of the Report states, for instance, that "[s]ubparagraph (i) [18 U.S.C. 2511(4)(c)(i)] decriminalizes the interception of 'network feeds' under title 18" and that "[s]uch conduct will be governed exclusively by section 705 of the Communications Act." *Senate Report* at 22. The statute makes clear that the interceptions referred to—those that were decriminalized and thus made subject exclusively to the Communications Act—are limited to network feeds that have not been encrypted or scrambled.

[5] Secton 705(b), 47 U.S.C. 605(b), exempts from Section 705(a)

> the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such

the interception, for private viewing, of transmissions that are not encrypted or scrambled if the viewer has not obtained authorization in accordance with a marketing system available to him.

Finally, even if the legislative history of 18 U.S.C. 2511 could support an implicit exception to that section for "private viewing" of intercepted satellite television transmissions,[6] that exception would not be available to persons, like petitioner, who are in the business of distributing devices designed to give unauthorized persons access to scrambled satellite transmissions.

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interception or receipt, of any statellite cable programming for private viewing if—

(1) the programming involved is not encrypted; and

(2) (A) a marketing system is not established under which—

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has [*sic*] obtained authorization for private viewing under that system.

[6] "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1031 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). See *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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